IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 344 of 2004
With
CRIMINAL APPEAL No. 2125 of 2004
With
CRIMINAL APPEAL No. 2546 of 2005
With
CRIMINAL MISC.APPLICATION No. 8227 of 2006
In CRIMINAL APPEAL No. 344 of 2004
With
CRIMINAL MISC.APPLICATION No. 8228 of 2006
In CRIMINAL APPEAL No. 2125 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MR.JUSTICE K.A.PUJ

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MAHESHBHAI GOPALBHAI PATEL - Appellant(s)
Versus
STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :
Criminal Appeal Nos. 344 and 2125 of 2004

Mr. BM Mangukiya with Ms. Bela Prajapati for appellant

Mr. KP Raval APP for respondent No.1

Mr. Jitendra Malkan for respondent No.2.

Criminal Appeal No. 2546 of 2005

Mr. Jayesh Dave for appellant

Mr. KP Raval APP for respondent No.1.

Mr. Jitendra Malkan for respondent No.2.

Criminal Misc. Application Nos.8227 and 8228 of 2006

Mr. BM Mangukiya & Ms. Bela Prajapati for applicant

Mr. KP Raval APP for opponent No.1.

Mr. Jitendra Malkan for opponent No.2.

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 11/10/2006

COMMON ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

1. Challenge in this batch of three appeals filed under Section 374 of the Code of Criminal Procedure ('the Code' for short) is to the correctness of the judgment and order dated 16.1.2003 rendered in Special Criminal (NDPS)

Case No. 8 of 1999 by the learned Additional Sessions Judge, Fast Track Court No.2, Bhavnagar by which the appellant in each appeal ('A-1', 'A-2' and 'A-3' for short) has been convicted for commission of the offence punishable under Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act, 1985' for short) and sentenced to suffer RI for ten years and fine of Rs.1 lac, i.d., S.I. for one year.

2. Briefly stated, the prosecution case as disclosed from the complaint as well as unfolded during trial, is as under:

2.1. A.H. Dodiya and D.R. Gohil, Customs Officers, received a secret information that A-1 and A-2 were in possession of narcotic drugs weighing about 500 grams and they wanted to sell it at the rate of RS.1,50,000/- per kg. The said information was reduced in writing and they arranged to lay a trap. The Customs Officers, therefore, hired Room No.203 in Hotel Live-In on

26.10.1998. D.R. Gohil, the Inspector of Customs, showed A-1 at the counter of the Hotel during the day time and, therefore, a fake customer informed A-2 that as and when he will be called in the Hotel, he may come along with drugs and after having examined the said substance, price thereof would be fixed. It is alleged that on 27.10.1998, a trap was laid and it was decided that at the time when the said accused arrive in the Hotel, they would be arrested. On the same day, two persons arrived in the Hotel, one on motor cycle and the other on scooter. D.R. Gohil, the Inspector of Customs, identified the said person A-2. It was alleged that A-1 was having a pouch of brown colour in his hand and they entered in the Hotel and in Room No.203, in the presence of panch witnesses, officers of the Customs Department carried out the raid. During the raid, it was informed by A-1 that in the said pouch there was Heroin. The officers asked A-1 and A-2 as to whether they would like to be searched in presence of a Magistrate or a Gazetted Officer. Langaliya, Superintendent of

Customs, who is a Gazetted Officer, was also present at the time of raid and, therefore, both the accused agreed to be searched in presence of Langaliya, who examined the pouch. In the pouch, white coloured powder was found. On preliminary test it was found to be prohibited drugs. The content thereof was found to be weighing 422 grams. On inquiry it was revealed that they were not holding any valid licence or permit to carry such drugs. From the said powder, two samples were drawn, weighing about 5 grams each, and the remainder of the seized material was packed in a paper box after having sealed the same and the panchnama was allegedly drawn of the seizure and sealing thereof in presence of panchas. Thereafter the samples were sent to FSL Junagadh for chemical analysis. During the course of investigation, on 27.10.1998, statement of A-1 was recorded under Section 67 of the NDPS Act, 1985 by the Superintendent of Customs and in the said statement A-1 informed how the prohibited drug was obtained by him. On 28.10.1998 statement of A-2 under Section 67 of the NDPS Act, 1985 was

recorded. On the basis of the said statement, residence of A-3 was raided but nothing incriminating was found from his residence. On 28.10,1998 statement of A-3 under Section 67 of the NDPS Act, 1985 was also recorded.

2.2. On 29.10.1998 further statement of A-1 was recorded wherein it was stressed that Police Constable Bhaskar Sardar was holding some additional Narcotic substance. Statement of Bhaskar Sardar under Section 67 of the NDPS Act, 1985 was recorded on 2.11.1998 wherein he stated that he never knew A-1 or A-3. On 13.11.1998 FSL, Junagadh reported that the samples forwarded by the Customs Department contained OXAZEPAM and TOLBUTAMIDE. Oxazepam is shown in the Schedule to the NDPS Act, 1985 as a psychotropic substance and, therefore, as defined under sub-section 23 of Section 2 of the NDPS Act, 1985 it is alleged to be a psychotropic substance.

2.3. All the accused were arrested on

13.11.1998 and further statements under Section 67 of the NDPS Act, 1985 were recorded on the same day. On 14.11.1998 the accused were produced before the learned Magistrate alleging that A-1 and A-2 were possessing narcotic drugs weighing 422 grams without any valid licence or permit and A-3 made necessary arrangement for the sale of it and thereby all of them have committed offence punishable under Sections 8 (c), 22, 28 and 29 (1) of the NDSP Act, 1985 and a complaint for the said offence was presented before the learned Special Judge, Bhavnagar on 21.1.1999 for the offences alleged in the complaint which was registered.

2.4. The learned Additional Sessions Judge and Fast Track Court No.2, Bhavnagar to whom the case was made over for trial, framed charge against the accused for commission of the offences punishable under Sections 8 (c), 22 and 29 of the NDPS Act, 1985. The charge was read over and explained to the accused. The accused

pleaded not guilty to the charge and claimed to be tried and thereupon they were put to trial by the learned Additional Sessions Judge in Special Criminal (NDPS) Case No.8 of 1999.

2.5. To prove the culpability of the accused, the prosecution has examined in all 13 witnesses and relied upon their oral testimonies, the details of which have been given in para 11 of the impugned judgment and order. They are as under:

PW No	Name	Ex. No.
1	Nishantbhai Hasmukhbhai Bhatt	55
2	Pravinchandra Shantilal Langaliya	81
3	Ashokbhai Haribhai Dodiya	106
4	Dharmendrasinh Ranjoysinh	109
5	Ajaykumar Pramodrai Joshi	111
6	Jaikishan Purshottambhai	115
7	Madhubhai Ukabhai Makwana	116
8	Maheshbhai Jagjivanbhai Patel	117
9	Kanubhai Thakarsibhai	118
10	Heridas Krishnabelle	121
11	Sukhdevbhai Balubhai	122
12	Balvantbhai Hirabhai	128
13	Bhagwanbhai Zalabhai	130

2.6. In order to prove the charge levelled

against the accused, the prosecution has also produced 26 documents and relied upon the contents thereof, the details of which have been narrated in paragraph 12 of the impugned judgment and order.

2.7. After recording of the evidence of the prosecution witnesses was over, the learned Additional Sessions Judge explained to the accused the circumstances appearing against them in the evidence of the prosecution witnesses and recorded their further statement under Section 313 of the Code. In their further statement they denied the case of the prosecution in toto. They have stated that they have been falsely implicated in the case. However, they have neither led any evidence nor examined any witness to support their defence.

2.8. On appreciation, evaluation, analysis and scrutiny of the evidence on record, the trial court held that it is proved by the prosecution

beyond reasonable doubt that when A-1 and A-2 were intercepted in hotel, they were found in possession of 422 grams of powder containing Oxazepam and Tolbutamide whereas A-3 has abetted A-1 and A-2 in selling the said powder, therefore, all of them have committed offence punishable under Section 22 of the NDPS Act, 1985. The trial court, therefore, held that the complicity of the accused for commission of the offence has been proved and accordingly they have been convicted for commission of the offence punishable under Section 22 of the NDPS Act, 1985 and sentenced them to suffer RI for ten years and fine of Rs.1 lac i.d., S.I. for one year, giving rise to these three separate appeals filed by the three accused.

3. Mr. BM Mangukiya, learned advocate of A-1 and A-2 and Mr. Jayesh Dave, learned advocate of A-3, submitted that there is infringement of mandatory provisions of Sections 41, 42 and 45 of the NDPS Act, 1985 as raid was carried out in clear contravention of the provisions of NDPS Act,

1985, and, therefore, conviction based on the said raid is contrary to the evidence on record and hence the trial is vitiated. It is contended by them that the trial court has committed serious error in appreciating the evidence of the officers of the Customs Department who have carried out the raid as well as carried out investigation. It is also highlighted by them that panch witnesses have not supported the seizure of the contraband article - powder. According to them, the entire process of raid, seizure and sealing was done in such a suspicious manner and several aspects have remained under cloud of suspicion inasmuch as there was no entry in the godown in which the muddamal article was alleged to have been stored by the investigating agency and, therefore, no reliance can be placed on the evidence of the prosecution witnesses who are members of the raiding party and more particularly from the Customs Department. It is also pointed out by them that no independent witness has been examined and therefore also the prosecution case

suffers from non-examination of independent witnesses. It is emphatically contended by them that the mixture which is alleged to have been seized by the Customs Officers and forwarded to the FSL at Junagadh, alleged to have been found to be mixture of two substances, namely, Oxazepam and Tolbutamide. The drug Tolbutamide is a group of the drugs known as Sulfonylureas. The chemistry of the said drug is Benzyndrine R_1—0—SO_2NHCNH-R_2. The first derivative of the Sulfonylureas is Tolbutamide (Oramide, orinase) – R_1-0-$HCHC_3$-R_2C_4HN. The said drug is given for the release of insulin from the pancreas beta cell. According to them, it is said that the Sulfonylureas is given traditionally in two group or generation of agents. The members of this class of drugs are substituted Arelsulfonylureas and differ by the substitutions in paraprepas on Benzyndrine and in one recipe – Nitrogen Urea – Urea Motiea. The first group of the Sulfonylureas includes Tolbutamide, Acetohexamide, Tolazamide and Chlorprapamide. The second drug of this group are Glyburide, Glytizide and Glyclazide. This

group of drugs cause hypoglycemia by stimulating insulin released from pancreas beta cell and therefore, they are used for the treatment of Diabetes. This drug is used world wide with various derivatives for the patients suffering from acute Diamutytis.

According to them, so far as Tolbutamide is concerned, it is a derivative of drug known as Benzodiazepines. 9 derivatives of Benzodiazepines are currently used and recommended for the treatment of anxiety. In their order of introduction, they are Clordiazepoxide. Clordiazepoxide, Diazepam, Oxazepam, Ohlorazepet, Chlorazepam, Prazepam, Alprazolam and Halazepam – these drugs are administered for the treatment of the patients who are suffering from varied group of anxious-neurotic disorders. The anxieties typically associated with psycho-neurotic disorder; the symptoms are sometimes commonly associated with depression especially with pspysthymic disorder which is considered as chronic neurotic depression and also in panic

disorder agoraphobia and other specific phobia obsesses which is a cumulative disorder, eating disorder and many personality disorders and therefore, Oxazepam is a drug which is used for neurological disorder. The said drug is also used in anxiety related gastro-intestinal disorder. The drug is also used in case of anxiety related cardio logical disorders. The said drug has been used widely in medical science which has been allegedly banned by the Central Government in exercise of its subordinate legislative powers. The mixture which is alleged to be contained of two drugs namely, Oxazepam and Tolbutamide. The substance which has been forwarded to the FSL, did not specify the quantity of the substance found from the sample so far as the Oxazepam is concerned. The ratio thereof is also not given. It is pointed out that the seizure material is allegedly to be 422 grams along with the plastic bag in which allegedly the material has been found. The separate weight of the powder has not been taken. Nothing has been brought on the record to show the weight of the plastic bag in

which the material allegedly seized was kept. Be as it may. It is further pointed out that the mixture is not banned. Oxazepam which is alleged to have been banned is defined by the Central Government vide its notification dated October 19, 2001 as 20 grams as a small quantity and 500 grams as commercial quantity. In absence of the quantity of the said drugs having been established on record, the finding recorded by the trial court that the accused have committed offence punishable under Sections 8 (c), 22 and 29 of the NDPS Act, 1985 is unsustainable.

On the aforesaid premises, according to them, the impugned judgment and order deserves to be quashed and set aside by allowing the appeals and acquitting the accused of the offences with which they were charged.

4. Alternatively it is submitted by Mr. Mangukiya and Mr. Dave that the trial court has imposed maximum sentence of ten years for commission of the offence punishable under

section 22 of the NDPS Act, 1985. According to them, the offence was committed on 27.10.1998 and the judgment was delivered on 16.1.2003. Therefore, the accused ought to have been sentenced under the Amended NDPS Act, 2001 which has come into force on 2.10.2001 whereby the benefit of the rationalized sentencing structure would have been given to the accused. As per the Amended NDPS Act, 2001, the accused ought to have been sentenced for commission of the offence for possessing narcotic drug weighing less than commercial quantity where the maximum punishable is RI for ten years. The accused are in jail for the last more than seven years and, therefore, benefit of the rationalized sentencing structure under the Amended NDPS Act, 2001 should be given to the accused and the period of imprisonment undergone by the accused may be treated as substantive sentence. Therefore, they urged that the sentence may be reduced to the aforesaid extent.

5. Mr. KP Raval, learned Additional PP for

respondent No.1 – State of Gujarat and Mr. Jitendra Malkan, learned advocate of respondent No.2, Customs Department, contended that the impugned judgment and order does not call for interference of this Court. According to them, the trial Court has rightly appreciated the evidence on record and rightly convicted the accused for commission of the offence under Section 22 of the NDPS Act, 1985 and rightly sentenced them to suffer RI for ten years which is the minimum prescribed sentence under the NDPS Act, 1985. They contended that there is no merit in the appeals and, therefore, urged that the appeals may be dismissed.

6. This Court has considered the submissions advanced by the learned advocates appearing for the parties and perused the impugned judgment and order. This court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record which is read and re-read by the learned advocates appearing for the parties with

reference to broad and reasonable probabilities of the case. In light of caution sounded by the Supreme Court while dealing with NDPS Cases, this court has examined the entire evidence on record for itself independently of the trial court and considered the arguments advanced on behalf of the accused and infirmities pressed, scrupulously with a view to find out as to whether the trial Court has rightly recorded the order of conviction and sentence.

7. At the outset, be it noted that to combat illicit drug traffic and drug abuse, both at the national and international levels, the penal provisions contained under the NDPS Act are stringent and punishment thereunder is harsh, therefore, as per the settled principles of criminal jurisprudence, the Court of law must insist on the strict compliance of the safeguards provided under the statutory provisions contained thereunder.

8. In this connection, it would be appropriate

to refer to the observations made by the Supreme Court in the case of Bharatbhai Bhagwanjibhai v. State of Gujarat, AIR 2003 SC 7. In para 1 of the said judgment, the Supreme Court has observed as under:

> “The Statement of Objects and Reasons of the NDPS Act categorically records the inadequacy of the existing legislation to combat illicit drug traffic and drug abuse, both at the national and international levels and it is by reason of such deficiencies in the existing laws, the legislature thought it prudent to consolidate the same and bring about a comprehensive legislation so as to meet the exigencies of the situation. A plain look at the provisions of the NDPS Act read with the Statement of Objects and the Preamble would depict the intent of legislature as regards the offences under the said consolidated legislation, which stands expressed in rather explicit language as one of the most heinous ones in nature. This Court, however, in consonance with criminal

jurisprudence of the country has been insisting on strict compliance of the safeguards provided under the statute so as to be in tune therewith".

9. In view of the stringent penal provisions and harsh punishment provided thereunder and in view of the observations made by the Supreme Court in the above referred to judgment, we have to find out as to whether in instant case strict compliance of the safeguards provided under the statute have been observed by the Investigating Agency during the course of search of the accused and seizure of the muddamal, the contraband powder.

10. A perusal of the entire testimonial collections in the form of oral as well as documentary evidence, it is seen that A.H. Dodiya and D.R. Gohil, Customs Officers, received secret information that A-1 and A-2 were in possession of narcotic drugs weighing about 500 grams and

they wanted to sell it at the rate of RS.1,50,000/- per kg. The said information was reduced in writing and they arranged to laid a trap. The Customs Officers, therefore, hired Room No.203 in Hotel Live-In on 26.10.1998. D.R. Gohil, the Inspector of Customs, showed th A-1 at the counter of the Hotel during the day time and, therefore, a fake customer informed A-2 that as and when he will be called in the Hotel, he may come along with drugs and after having examined the said substance, price thereof would be fixed. It is alleged that on 27.10.1998, a trap was laid and it was decided that at the time when the said accused arrive in the Hotel, they would be arrested. On the same day, two persons arrived, one on motor cycle and the other on scooter. D.R. Gohil, the Inspector of Customs, identified the said person A-2. It was alleged that A-1 was having a pouch of brown colour in his hand and they entered in the Hotel and in Room No.203 in the presence of panch witnesses, officers of the Customs Department carried out the raid. During the raid, it was informed by A-1 that in the said

pouch there was Heroin. The officers of Customs Department asked A-1 and A-2 as to whether they would like to be searched in presence of a Magistrate or a Gazetted Officer. Langaliya, Superintendent of Customs, who is a Gazetted Officer, was also present at the time of raid and, therefore, both the accused agreed to be searched in presence of Langaliya, who examined the pouch. In the pouch, white coloured powder was found. On preliminary test it was found to be prohibited drugs. The content thereof was found to be weighing 422 grams. On inquiry it was revealed that they were not holding any valid licence or permit to carry such drugs. From the said powder, two samples were drawn weighing about 5 grams each and the remainder of the seized material was packed in a paper box after having sealed the same and the panchnama was drawn of the seizure and sealing thereof in presence of panchas. Thereafter the samples were sent to FSL Junagadh for chemical analysis. During the course of investigation, on 27.10.1998, statement of A-1 was recorded under

Section 67 of the NDPS Act, 1985 by the Superintendent of Customs and in the said statement A-1 informed how the prohibited drugs were obtained by him. On 28.10.1998 statement of A-2 under Section 67 of the NDPS Act, 1985 was recorded. On the basis of the said statement, residence of A-3 was raided but nothing incriminating was found from his residence. On 28.10,1998 statement of A-3 under Section 67 of the NDPS Act, 1985 was also recorded. On 29.10.1998 further statement of A-1 was recorded wherein it was stressed that Police Constable Bhaskar Sardar was holding some additional Narcotic substance. Statement of Bhaskar Sardar under Section 67 of the NDPS Act, 1985 was recorded on 2.11.1998 wherein he stated that he never knew A-1 or A-3. On 13.11.1998 FSL, Junagadh reported that the samples forwarded by the Customs Department contained OXAZEPAM and TOLBUTAMIDE. Oxazepam is shown in the Schedule to the NDPS Act, 1985 as a psychotropic substance and, therefore, as defined under sub-section 23 of Section 2 of the NDPS Act, 1985 it is alleged

to be a psychotropic substance. All the accused were arrested on 13.11.1998 and further statements under Section 67 of the NDPS Act, 1985 were recorded on the same day. On 14.11.1998 the accused were produced before the learned Magistrate alleging that A-1 and A-2 were possessing narcotic drugs weighing 422 grams without any valid licence or permit and A-3 made necessary arrangement for the sale of it and thereby all of them have committed offence punishable under Sections 8 (c), 22 and 29 of the NDSP Act, 1985 and a complaint for the said offence was presented before the learned Special Judge, Bhavnagar on 21.1.1999 for the offences alleged in the complaint which was registered.

11. Several points have been canvassed by the learned advocates appearing for the accused with regard to the infirmities in the prosecution case and more particularly the non-specifying the percentage of the samples of the contraband

article, powder, which is a mixture of Oxazepam and Tolbutamide, by the FSL. The mixture which is alleged to be contained of two drugs, namely, Oxazepam and Tolbutamide. The substance which has been forwarded to the FSL, did not specify the quantity of the substance found from the sample so far as the Oxazepam is concerned. The ratio thereof is also not given. The weight of the material seized is 422 grams which is admittedly less than commercial quantity and therefore this Court deems it expedient to examine the alternative contention with regard to the according benefit of the rationalized sentencing structure advanced by the learned advocates appearing for the accused.

12. Section-41 of the Amended NDPS Act, 2001 deals with application of the said Act to pending cases. Sub Section-1 of Section-41 of the Amended NDPS Act, 2001 reads as under:-

> *“Sub Section-1 of Section-41 – Notwithstanding anything contained in sub-section (2) of Section 1, all cases pending*

before the Courts or under investigation at the commencement of this Act shall be disposed of in accordance with the provisions of the principal Act as amended by this Act and accordingly, any person found guilty of any offence punishable under the principal Act, as it stood immediately before such commencement, shall be liable for a punishment which is lesser than the punishment for which he is otherwise liable at the date of the commission of such offence;

Provided that nothing in this section shall apply to cases pending in appeal."

13. In the case of **Basheer alias N.P.Basheer vs. State of Kerala, reported in (2004) 3 Supreme Court Cases 609** the interpretation of Section 41 (1) of the Amended NDPS Act, 2001 has come up for consideration before the Supreme Court. In the said case the Supreme Court has observed that by this section, Parliament has declared its

intention to apply the amended provisions of the Act to: (a) all cases pending before the court on 2.10.2001; (b) all cases under investigation as on that date; and provides that these categories of cases shall be disposed of in accordance with the provisions of the NDPS Act, 1985 as amended by the Amended NDPS Act, 2001. In other words, the benefit of the rationalized sentencing structure would be applicable to these categories. The proviso, however, makes an exception and excludes the application of the rationalized sentencing structure to cases pending in appeal. The Court further observed in para-12 of the judgment that all statues must be interpreted as prospective in operation, unless retrospectivity is expressly declared by the statute or to be inferred as the necessary intendment from the language used in the statute. As far as the amendments introduced in the NDPS Act, 1985, by Act 9 of 2001 are concerned, Section-41, in term, says that the amending Act would apply to all cases pending before the court or under investigation on the date of

commencement of the amending Act. In other words, it is to be applied retrospectively. If the Act had contained any provisions to the detriment of the accused, then undoubtedly, it would have been hit by the rule against post facto legislation contained in Article 20(1). However, the court found that the amendments (at least the ones rationalising the sentencing structure) are more beneficial to the accused and amount to mollification of the rigour of the law. Consequently, despite retrospectivity they ought to be applied to the cases pending before the Court or even to cases pending investigation on the date on which the amending Act came into force. Such application would not be hit by Article 20(1) of the Constitution.

14. So far as the offence registered against the accused is concerned, admittedly the incident had taken place on 27.10.1998 at Hotel Live-In when the contraband article powder was seized and at that time NDPS Act, 1985 was in force. The judgment was delivered on 16.1.2003 and the

Amended NDPS Act, 2001 came into effect from 2.10.2001. Admittedly under the NDPS Act, 1985 punishment for commission of offence under section 22 is not less than ten years but which may extend to 20 years and shall also liable for fine which shall not be less than Rs.1 lakh whereas under the Amened NDPS Act, 2001, the commission of the offence under section 22 falls in three categories as per the quantity of the contraband article seized:

(i) small quantity

(ii) less than commercial quantity but more than the small quantity;

(iii) commercial quantity.

The contraband article Oxazepam recovered from the accused was weighing 422 grams which is admittedly not a commercial quantity but it is also not a small quantity. The quantity seized from the accused is more than small quantity but less than commercial quantity. Therefore the punishment is to be awarded as per clause (b) of section 22 of the Amended NDPS Act, 2001.

15. The trial court has imposed minimum sentence under section 22 of the NDPS Act, 1985 as it stood before the Amended NDPS Act, 2001 came into force with effect from 2.10.2001. Therefore, according to us, the punishment imposed by the trial court under the NDPS Act, 1985 does not stand to scrutiny of this court as the trial court has considered the minimum sentence of ten years as appropriate for commission of the offence under section 22 of the NDPS Act, 1985 but in fact the trial court ought to have imposed sentence under the Amended NDPS Act, 2001 wherein the punishment prescribed is rigorous imprisonment for a term which may extend to ten years and with fine which may extend to one lakh rupees by virtue of cause (b) to section 22, meaning thereby, the Court can impose RI upto 10 years but there is no question of imposing minimum sentence of ten years in instance case. In this case, all the accused have undergone sentence of more than seven years and there is an infirmity in analysis of the sample

by the FSL as FSL has not decided the ratio between Oxazepam and Tolbutamide. PW 1, Nishantbhai Hasmukhbhai Bhatt, Ex.55, has admitted in his evidence that Tolbutamide is not covered under the Narcotic Drugs and Psychotropic Substance Act and, therefore, according to us looking to this infirmity and considering the fact that the accused have already undergone imprisonment for a period of seven years, while maintaining the order of conviction, we are of the opinion that the sentence of RI for ten years imposed on the accused under the NDPS Act, 1985 is required to be altered into sentence under the Amended NDPS Act, 2001 by imposing sentence of seven years and fine of Rs.50,000/- i.d., SI for six months as the case is covered under clause (b) of the Section 22 of the Amended NDPS Act, 2001.

16. Seen in the above context, the judgment and order of conviction recorded under Section 22 of the NDPS Act, 1985 against the accused deserves

to be confirmed and maintained, however, it is altered into conviction under Section 22 of the Amended NDPS Act, 2001 and, therefore, the sentence imposed on them is required to be reduced in terms of the final order as per this judgment.

17. For the foregoing reasons, the appeals succeed in part and accordingly they are partly allowed qua sentence only. The impugned judgment and order of conviction, convicting the accused for commission of offence punishable under Section 22 of the NDPS Act, 1985 is altered into conviction under section 22 of the Amended NDPS Act, 2001 and accordingly all the accused are sentenced to suffer RI for seven years and to pay fine of Rs.50,000/- and in default of payment of fine, SI for six months.

In this manner, all the three appeals stand disposed of accordingly.

18. Since the Criminal Appeals are partly allowed qua sentence only, Criminal Misc. Application No.8227 of 2006 in Criminal Appeal No.344 of 2004 and Criminal Misc. Application no.8228 of 2006 in Criminal Appeal No.2125 of 2004 filed by A-1 and A-2 respectively praying to releasing them on bail during the pendency of these appeals are disposed of as not pressed by Mr. Mangukiya, learned advocate of A-1 and A-2.

(A.M. Kapadia, J.)

(K.A. Puj, J.)

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(karan)